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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 618

ARKANSAS FUEL OIL COMPANY, PETITIONER,

VS.

MAGRATH OIL COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

SIZER, CHAMBLISS & KEFAUVER,
JOHN A. CHAMBLISS, JR.,
JOHN A. CHAMBLISS,
Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

ARKANSAS FUEL OIL COMPANY, PETITIONER,

VS.

MAGRATH OIL COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Arkansas Fuel Oil Company, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals rendered and entered on the 8th day of October, 1942, in this case, lately pending in said United States Circuit Court of Appeals for the Sixth Circuit, styled Arkansas Fuel Oil Company, appellant, vs. Magrath Oil Company, appellee, being cause No. 9082 of civil causes on the docket of said United States Circuit Court of Appeals for the Sixth Circuit, affirming a judgment of the United States District Court within and for the Southern Division of the Eastern District of Tennessee in said cause against your petitioner.

JUDGMENT OF THE COURT BELOW.

The judgment affirming the action of the District Court made by the United States Circuit Court of Appeals for the Sixth Circuit in said cause of Arkansas Fuel Oil Company, appellant, vs. Magrath Oil Company, appellee, which petitioner here seeks to have reviewed, appears on pages 509 and 510 of the printed transcript of the record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Pleadings, Procedure and Action of the District Court.

This is a suit removed from the Circuit Court of Hamilton County, Tennessee, which sought to recover a judgment for $13,500 and also for cancellation of notes and deeds of trust securing debts. One ground set up for recovery was breach of contract in the delivery of gasoline inferior in quality to that specified. Ten thousand dollars ($10,000) in damages were sought because "plaintiff has lost many of its customers * * *" (R. 6). Another ground set up for recovery was for deceit in representing to a lessee that a former lessee sold 80,000 gallons of gasoline each month, this representation being made to induce the execution of a lease at a rental of $815 per month, when in fact the sales of the previous lessee had averaged but 31,000 gallons per month. The claim is that the "plaintiff lost more than $3,000 by the payment of excessive rent" (R. 7). Cancellation of the obligations was also prayed (R. 7).

Upon the trial before a jury there was a verdict for $7,500 on the first count, alleging enhanced damages for breach of contract (reduced to $5,000 by remittitur), and $3,000 on the second count, alleging deceit (R. 353

and 361). There being an indebtedness of $3,252.81, in consequence a net final judgment of $4,747.19 was entered (R. 361).

The Facts As to Breach of Warranty.

The facts are that gasoline of a certain quality and character was to be delivered. The conclusion from the verdict of the jury is that an inferior gasoline was delivered. However, the Magrath Oil Company knew the gasoline was inferior and accepted it, and then sold the gasoline to its customers, knowing that it was inferior to the gasoline that should have been delivered (R. 122, 123). Good-will and customer trade were lost in selling the gasoline. In this suit enhanced damages were recovered for loss of trade.[1]

The Facts As to Fraud and Deceit.

E. K. Magrath testified that it was "during the first month" that he discovered the alleged fraud (R. 42). He was asked what he did, and in effect said the Magrath Company did nothing (R. 42).

There is no evidence that the Magrath Company did anything at this time to seriously question the executory obligation. The Magrath Company accepted a suggestion that certain equipment not yet installed be installed (R. 42).

After having knowledge of the alleged fraud and deceit, the Magrath Company installed new grease racks and gasoline pumps that had not been installed before (R. 42).

This is a fair summary of the evidence as to what took place when the Magrath Company "discovered" fraud and deceit on the part of the lessor. The rent was not reduced at the time (R. 44). The Magrath Company, though claiming later to have been induced through fraud

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[1]The allegation in the original pleading is that there was a delivery of gasoline of inferior grade and quality, and that the plaintiff thereby "lost many of its customers and has suffered great damage" (R. 6).

and deceit to execute the lease, paid the full rental fixed in the lease for six consecutive months (R. 48).

Two of the partners went to Shreveport, the headquarters of petitioner, in August, 1938 (R. 293). They negotiated about the rental and secured an agreement to a reduction in the monthly rental of $200, or from $815 per month to $615 per month (R. 48, 49).

Apparently satisfied with this $200 a month concession, the Magrath Company then regularly paid the rental of $615. A new contract for the distribution or sale of gasoline was negotiated and made between the parties as of November 21, 1938 (R. 53). In other words, after six months of knowledge of the alleged deceit, the Magrath Oil Company accepted a rent concession of $200 (R. 46) and then continued at the modified rental of $615 per month until June or July, 1939 (R. 51, 293).

In March, 1939 (R. 411), the lease for a year ended, but both parties under its terms continued, at the lowered rental. In the summer of 1939 further concessions modified the lease so as to fix a rental of one cent per gallon (R. 293, 51). This was the rental the Magrath Oil Company now claims should have been charged for the fifteen or sixteen months the lease had been in effect (R. 7 and 37). This was the second modification of the lease sought and obtained by the respondent (R. 293). And all this time, during all these negotiations, there was not a hint that there would be a suit for fraud and deceit. On the other hand, the Magrath Company executed three notes and in fact was under no pressure regularly paying on one or the other of these notes.[2] These actions are clear and unequivocal evidence that the Magrath Oil Company was proceeding to carry out the lease contract and the gasoline sales contract with the hope both would be profitable.

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[2]With full knowledge of the gallonage, the Magrath Oil Company executed a $3,000 note dated April 22, 1938 (R. 19 and 24), a $1,200 note dated May 18, 1938 (R. 19 and 25), and a note for $641.34 dated November 7, 1938 (R. 20 and 25).

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the acts of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Court of Appeals. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on October 8, 1942 (R. 509, 510). A petition for a rehearing was duly filed by this petitioner, appellant in said Circuit Court of Appeals, within the time provided by the rules of said Circuit Court of Appeals (R. 511-527), and said petition for a rehearing was denied by said Circuit Court of Appeals on December 1, 1942 (R. 529).

QUESTIONS PRESENTED.

The questions of law presented by petitioner's petition herein for writ of certiorari are:

1. Whether in an action for damages for breach of warranty for sale of goods a purchaser of gasoline who knowingly accepted an inferior quality and sold the inferior quality to customers, and thus enhanced damages, can recover enhanced damages for loss of customers.

2. Whether in an action for fraud and deceit one who proceeds to do business under the obligation induced by the deceit and negotiates and secures concessions with respect to the obligation can recover damages for the deceit.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Court of Appeals erred in its failure to apply the law of Tennessee with respect to damages for breach

of warranty in the sale of goods, as set forth in an opinion of the Supreme Court of Tennessee in the case of *Lamborn & Co.* v. *Green & Green*, 150 Tenn. 38. The Supreme Court of Tennessee there held that a purchaser of goods of warranted quality who knowingly accepted and used an inferior quality and thus enhanced damages cannot recover enhanced damages. This question was not dealt with by the Court of Appeals in the disposition of this case.

2. The judgment of the Court of Appeals is grounded upon Section 7262 of Williams' Tennessee Code, and is expressly grounded upon the case of *Marcum* v. *Potter*, 148 Tenn. 251, and *Cotton Oil Co.* v. *Gin & Lumber Co.*, 138 Tenn. 58, and said judgment applies that Code section and those Tennessee cases to the facts in this suit for deceit. The Code section is part of the Law of the Sale of Goods, and has to do with the sale of goods only, and the two cases cited construe that Law, while the tort claim set up in this case was for fraud and deceit in inducing the execution of a lease, and not for the sale of gods, and said Code section and authorities have no application.

3. The Court of Appeals erred in failing to apply the law of Tennessee as set forth in the case of *Wells* v. *Holley*, 145 Tenn. 345, in which the opinion approved and the decision was expressly grounded on the case of *Simon* v. *Goodyear Metallic Rubber Shoe Company*, 105 Fed. 573, 52 L. R. A. 745, a case decided by the Sixth Circuit Court of Appeals in 1900. The Supreme Court of Tennessee there held that one who, having knowledge of deceit, proceeds with the execution of the obligation induced thereby, is precluded from asserting damages by reason of the deceit.

4. In this case the Circuit Court of Appeals for the Sixth Circuit held that in this suit for deceit your petitioner is liable in damages though the respondent after knowledge of the deceit continued performance of the

lease induced and sought and secured concessions favorable to it, and this conclusion of the Court is in conflict with a recent opinion of the Court of Appeals for the Eighth Circuit in the case of *Phillips Petroleum Co.* v. *Rau Construction Co.*, 130 F. 2d 499.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that the judgment of said Court of Appeals in said cause of Arkansas Fuel Oil Company, Appellant, vs. Magrath Oil Company, Appellee, No. 9082, be reviewed by this Court, as provided by law, and that upon such review the judgment of said Court of Appeals in said cause, of date October 8, 1942, be reversed, and that petitioner have such other relief as to the Court may seem appropriate.

SIZER, CHAMBLISS & KEFAUVER,
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Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The judgment or opinion of the Court of Appeals has not been reported. It was brief, was entitled a judgment, but may be also interpreted as an opinion, since it referred to the facts, to the contention of petitioner, to the general law, to the statutes of Tennessee, and to Tennessee cases (R. 509, 510).

GROUNDS ON WHICH JURISDICTION INVOKED.

Petitioner invokes the jurisdiction of this Court on the ground that the Tennessee or local law was not applied in the case, on the ground that one of the two conclusions in the case was in conflict with a decision of another Circuit Court of Appeals on the same matter, and on the ground that one of the two conclusions in the case is in conflict with a decision of the Sixth Circuit Court of Appeals on the same matter.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for writ of certiorari and in the interest of brevity are not repeated here. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATION OF ERROR TO BE URGED.

The Court of Appeals for the Sixth Circuit in its judgment affirming the District Court and in the opinion expressed in said judgment filed in this cause on October 8, 1942 (R. 509, 510) erred:

(1) Because said judgment is in conflict with an applicable local decision on the question arising under the Sales Act of Tennessee, said Court having held that a purchaser of gasoline who accepts a quality claimed to be inferior, with knowledge of inferiority, may recover enhanced damages arising out of loss of customers to whom the gasoline was sold, this conclusion being in direct conflict with the law of Tennessee as expressed in the case of *Lamborn & Co.* v. *Green & Green,* 150 Tenn. 38.

(2) Because said judgment was in conflict with an applicable local decision on the question arising under the claim for damages growing out of fraud and deceit, said Court of Appeals holding that continuing relationships with and securing concessions from a lessor who deceived a lessee as to the true facts about sales of gasoline through a group of stations is liable in damages, although the lessee promptly discovered what were the true facts, continued to operate the stations, and secured concessions with respect to the rental thereof. The Court of Appeals failed to apply the Tennessee case of *Wells* v. *Holley,* 145 Tenn. 345, in which the Supreme Court of Tennessee held in an elaborate opinion that damages cannot be recovered when one induced to agree by fraud becomes aware of the fraud and continues to recognize and operate under the agreement.

(3) Because said judgment was in conflict with the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Phillips Petroleum Co.* v. *Rau Construction Co.,* 130 F. 2d 499, in which that Court of Appeals had under consideration a suit for damages for fraud and deceit wherein the party alleging deceit had continued business relationships with the alleged wrongdoer and negotiated and secured concessions with respect to the matter involved, said Court holding that the unanimous rule is that recovery cannot be had under such circumstances; and the judgment complained of is

also in conflict with another opinion and decision of the Court of Appeals for the Sixth Circuit in the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 52 L. R. A. 745.

The argument being concise, and the specification of errors summarizing the argument, a further summary of the argument is deemed unnecessary and, in the interest of brevity, omitted.

ARGUMENT.

Directly and concisely stated, this case calls for an exercise of this Court's power of supervision for the following reasons:

1. In that aspect of the case grounded upon the insistence damages should be recovered because gasoline of a quality inferior to that specified in the contract was delivered and on that account the respondent suffered damages by reason of loss of customers, the Court of Appeals failed to apply the Tennessee law. The Court of Appeals failed to apply the rule laid down by the Supreme Court of Tennessee in the case of *Lamborn & Company* v. *Green & Green,* 150 Tenn. 38. In this case the Supreme Court of Tennessee construed the Sales Act which had been recently adopted in Tennessee, and so the references in the report are to the Acts of Tennessee. This is the same provision, however, that was subsequently carried into the Code of Tennessee effective in 1932. That portion of the section and the sub-section which is pertinent and which was construed by the Supreme Court in this case reads as follows:

> "Sec. 7262. *Remedies for Breach of Warranty.*
>
> "(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the value of the goods at the time of delivery to buyer and the value they

would have had if they had answered to the warranty."[1]

The Supreme Court of Tennessee in construing the Tennessee statute was dealing with a case in which sugar had been sold. The purchaser found that the sugar did not answer to the warranty and so advised the seller. Notwithstanding this knowledge, the purchaser used the sugar. Under this state of facts the Supreme Court held:

> "Although the *purchaser* promptly informed the *seller* that an attempt to use this sugar in the manufacture of *purchaser's* goods would be disastrous, nevertheless the *purchaser* proceeded to do that very thing. Certainly the *purchaser* could not have a recovery for the enhanced damages they sustained by reason of the experiments made with this sugar, in view of *the purchaser's* appreciation of the probable results" (p. 51).[2]

Nothing is plainer than that the respondent, the purchaser of the gasoline in question, takes the position that when deliveries of the gasoline were made, the respondent had full knowledge of the quality of the gasoline.[3]

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[1]This quotation has been slightly changed, *complainant* and *defendant* indicating *seller* and *purchaser*. The words substituted are in italics. The head-note in the case reads as follows:

> "9 - SALES. *Buyers using sugar after informing sellers that attempt would be disastrous cannot recover enhanced damages from so doing.* Buyers using sugar purchased in manufacturing their goods after promptly informing sellers that such attempt would be disastrous cannot recover enhanced damages sustained by reason of experiments (*Post* pp. 51, 52)."

[2]The entire section is set out in the Appendix in order that its provisions may be seen in the relation intended.

[3]The testimony of E. K. Magrath with respect to this is clear and unequivocal. His company knew each time it secured gasoline that it was not what it should be. It deliberately accepted the gasoline and used it, and, if it was inferior, misrepresented it to the trade. The claim is that customers were lost in this way. His testimony with respect to this is as follows:

Under these circumstances the case of *Lamborn & Co.* v. *Green & Green* should have been applied to the facts of the case, as it construes a statute of Tennessee and therefore the Court of Appeals was in error.

2. In that aspect of the case grounded upon the insistence that the execution of the lease was induced by fraudulent representations as to the amount of gasoline sold by the preceding lessee, the Court of Appeals was in error in that its decision is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in the case of *Phillips Petroleum Co.* v. *Rau Construction Co.*, 130 F. 2d 499. The Court of Appeals in dealing with this question held that "conceding the soundness of appellant's contention that a contract may not be rescinded if the contracting party continues to operate under it after knowledge of misrepresentation, this does not preclude him from asserting damages suffered by reason of the misrepresentation for a breach of warranty, and the Tennessee law does not depart from the general rule in this respect." Your petitioner set up no contention with respect to the rescission of the contract, but stood alone on the position that the dealings of the respondent with your petitioner after full knowledge of the misrepresenta-

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X.242. In other words, to put it another way, when you would send your tank wagon out there on South Broad Street to get a load of gasoline, you knew it was going to be gasoline you did not like?

A. Yes.

X.243. What was the attitude of your customers about this gasoline, in this respect, did you make any character of representations to them about the quality of the gasoline they were getting?

A. Any representations to them?

X.244. To your customers, yes, and tell them it was good?

A. Yes, I told them it was equal, jamb up, equally as good as anybody else's in Chattanooga.

X.245. What I mean is, Mr. Magrath, you did not tell them that when you found out it was not, though, did you?

A. Yes, I told them right on (R. 122, 123).

tions[4] were such as to preclude a recovery for damages in a suit for fraud and deceit. The Court of Appeals held that the Tennessee law as to the sale of goods (specifically Code, Sec. 7262) is applicable to and supports the recovery of damages in this case for fraud and deceit in inducing the execution of a lease. The conflict with the Eighth Circuit case we have referred to, *Phillips Petroleum Co.* v. *Rau Construction Co.*, arises out of the fact that in that case the Court of Appeals for the Eighth Circuit held:

> "The authorities are unanimous in holding that, where one has been induced by fraud to enter into a contract and, after discovery of the fraud, enters into an agreement concerning the subject matter of the contract, or demands and receives from the other party any substantial concession in respect to the transaction, he is conclusively deemed to have waived any claim for damages on account of fraud."[5]

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[4]The parties executed a lease for a year (R. 411). Less than thirty days after the lease was made, the Magrath Oil Company complained of alleged deceit in inducement (R. 42). Having knowledge, it paid rent six months (R. 48). Then at the request of the Magrath Company the lessor reduced the rent $200 per month beginning in September, 1938 (R. 48). The Magrath Company then paid the adjusted rental for September and each month thereafter. Under its terms, the one year lease renewed March 1, 1939 (R. 412), and the Magrath Company paid the fixed rental from March to June or July (R. 51). Finally, after performing, then securing a concession, then paying the adjusted rental, the Magrath Company, without any intimation of suit, about fifteen months after the signing of the lease, secured another modification making the rental one cent a gallon (R. 51). Three months later, in October, 1939 (R. 3), this suit was brought although during the period of over eighteen months the Magrath Company had executed three different notes payable to the Arkansas Fuel Oil Company for obligations (R. 20 and 25).

[5]The full quotation is as follows: "*The authorities are unanimous* in holding that where one has been induced by fraud to enter into a contract and, after discovery of the fraud, enters into an agreement concerning the subject matter of the contract, or demands and receives from the other party any sub-

Furthermore, the action of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Sixth Circuit in the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 52 L. R. A. 745.[6]

3. The Court of Appeals failed to apply the local or Tennessee rule of law with respect to tort actions for fraud and deceit, and the recovery of damages therefor. This rule in Tennesse is found most fully expressed in the case of *Wells* v. *Holley*, 145 Tenn. 345, *an action for damages for deceit*, not rescission. The Supreme Court of Tennessee in that case refered to, relied upon, and practically adopted the opinion in the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 52 L. R. A. 745.[7]

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stantial concession in respect to the transaction, he is conclusively deemed to have waived any claim for damages on account of fraud. * * * The rule has been held to apply although the party claiming the fraud remains silent concerning it in the negotiations in which the amendment to the contract or a concession in his favor is secured. 24 Am. Jur., Sec. 214. And in some jurisdictions it is held that a right of action for damages for deceit is waived by a party to an executory contract who continues performance after discovery of the fraud which induced its execution." Tennessee is, according to *Wells* v. *Holley*, one of these.

[6]The last paragraph of the opinion in that case reads:

"When the plaintiff learned, as he did in May, 1895, that the several factories which had been operated by the Rubber Reclaiming Company had not gone out of business of reclaiming old rubber, but were actively prosecuting that business, and in the market, each for itself, competing for waste rubber, he knew the material facts which went to make his case for deceit. By thereafter deliberately proceeding with the execution of the contract, he waived the deceit and affirmed the contract."

[7]Mr. Justice Lurton, who as a judge of the Sixth Circuit Court of Appeals wrote the opinion in this case, had formerly been a justice of the Supreme Court of Tennessee, and no doubt the full quotation of his opinion set out in *Wells* v. *Holley* was the result of this relationship.

In *Wells* v. *Holley* the Court held (p. 349):

"We are aware of the fact that in some jurisdictions carrying out an executory contract does not waive the right to recover damages for fraud and deceit, but in practically all jurisdictions the right of rescission of such a contract is lost where the party carries it out and executes it after knowledge of the fraud. The principle applicable in this case was, we think, clearly stated and applied by the United States Circuit Court of Appeals for the Sixth Circuit in *Simon* v. *Goodyear, etc.*, in which opinion of the Court was delivered by Mr. Justice Lurton, and from which we quote: * * *."

Thereupon the Supreme Court of Tennessee proceeds to quote at length from the opinion of the Court of Appeals.

In the concluding language of this opinion by the Supreme Court of Tennessee, we find that Court giving its approval to the principle applicable to the facts of the instant case.

" 'Where one is induced by fraud, in the form of false representations, to enter into a contract, and afterwards, upon obtaining full knowledge of the fraud practiced upon him, and of all material facts, declines to repudiate it and expressly ratifies it, he can neither rescind nor maintain an action for damages.'

"Upon the foregoing authorities and upon principle we think the acts of the plaintiff in this case constitute a waiver of the alleged fraud, and an abandonment of the claim for damages. At the institution of this suit the plaintiff had paid but $190 of the sum of $2,000 agreed in the contract. It was his clear duty at that time, after full knowledge of the acts of fraud, if there was fraud, to have abandoned the contract and to have brought the proper action for the damage he had then sustained. He cannot insist upon the continuance of a contract covering a long future period and at the same time claim damages for the fraud that induced it.

> "In the language of some of the authorities he must either stop or go on with the contract. It is manifestly unjust that he should be permitted to do both." Page 359.

It is clear without any haziness at all that negotiations were carried on by the respondent in this case, and that in consequence of such negotiations the respondent secured concessions, such as a reduction from $815 a month to $615 a month of the rental, and subsequently succeeded in securing a concession reducing the rental to 1c per gallon, all of this with full knowledge as to the alleged fraud.

Petitioner therefore prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit rendered herein on the 8th day of October, 1942, be reversed.

Respectfully submitted,

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APPENDIX.

Section 7262 of the Tennessee Code of 1932:

7262. *Remedies for breach of warranty.* - (1) Where there is a breach of warranty by the seller, the buyer may, at his election:

(a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods; or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 7246.

(6) The measure of damages for breach of warranty is the loss, directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. (1919, ch. 118, sec. 69.)

JAN 20 1943

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 618

ARKANSAS FUEL OIL COMPANY, PETITIONER,

VS.

MAGRATH OIL COMPANY, RESPONDENT.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

ARKANSAS FUEL OIL COMPANY, PETITIONER,

VS.

MAGRATH OIL COMPANY, RESPONDENT.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

VERDICT AND OPINIONS BELOW.

This case was tried by a jury in the District Court, and the verdict of the jury and the opinion of the District Court are shown in the printed transcript (R. 353, 360, 362).

The jury found the petitioner guilty of breaching its contract with respondent and awarded the sum of $7,500 as damages and also found the appellant guilty of fraud and misrepresentation in obtaining a lease from respondent and awarded damages of $3,000—a total of $10,500. The District Court suggested a remittitur of $2,500 on the breach of contract award and allowed the fraud and

misrepresentation award by the jury to stand. Respondent accepted the suggested remittitur and after deducting the indebtedness of $3,252.81, a net judgment was entered (R. 361-362) in the amount of $4,747.19 on June 26, 1941. Whereupon on July 31, 1941, petitioner appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 363). The case was heard on October 7, 1942, and the judgment affirming the District Court was entered by the Circuit Court of Appeals on October 8, 1942 (R. 509-510).

Petitioner filed a petition to rehear on October 30, 1942 (R. 513-527), and petition for rehearing was denied on December 1, 1942 (R. 529). The Circuit Court's opinion is reported in 131 F. 2d 318.

STATEMENT OF THE CASE.

Respondent filed its suit against petitioner on October 21, 1939, in the Circuit Court of Hamilton County, Tennessee, for damages in the amount of $13,500. The suit was divided into three parts or counts. The first count was for $10,000 damages for breach of contract (R. 6); the second count was for fraud and misrepresentation in obtaining a contract of lease (R. 6-7); the third count was for the cancellation of notes given by respondent in payment of merchandise purchased from petitioner during the period from March 1, 1938, to November 7, 1938 (R. 78). The suit was removed to the Federal Court (R. 13).

Petitioner in 1938 purchased the business of the Patterson Oil Company consisting of nine filling stations and a bulk plant for $75,000 (R. 49). It had been selling its product to Patterson who was acting as its distributor. After buying Patterson's stations, it could control the output of its products and was seeking a new distributor for Chattanooga and the surrounding territory (R. 41, 90).

The respondent was formed with a capital of $9,500 (R. 29) and, after being formed for the purpose, it entered into a contract of lease with petitioner for its nine filling stations and also into a distributor sales agreement to handle its products (R. 375-377 F and R. 411-427).

There were two contracts, one for the lease of filling stations (R. 411-416) and one for the purchase of KOOL-MOTOR gasoline and oils (R. 375-377 F).

One contract, while separate and distinct from the other, was, in reality, dependent upon the other (R. 328-333).

Both contracts were entered into at the same time, but the contract of lease which was obtained through fraud and misrepresentation could not be rescinded by respondent without it being forced to breach or cancel its contract to buy the products described in the distributor's sales agreement. Respondent found no fault with this contract. Gasoline was delivered as contracted by petitioner from its Shreveport Refinery (R. 31-32-33).

Respondent knew during the first month that the petitioner had misrepresented the gallonage going through the stations and immediately took the matter up with petitioner who told them to "go ahead and get the grease racks fixed up, go ahead, get the other pumps put in there, go ahead and push the thing and it would not take long to get the 80,000 gallons through the stations" (R. 42, 44-49, 107-111).

All of respondent's capital had been invested in the business before the fraud was discovered (R. 42) and if the contract had been rescinded then, both the Magraths would have been out of a job and out their entire investment (R. 123).

The damages sued for by reason of the fraud and misrepresentation on the contract of lease were for the period from March 1, 1938, to August 31, 1938 (R. 48-49). During the period, petitioner had not breached its distributor's sales agreement (R. 32).

On November 21, 1938, a new distributor's sales agreement was entered into (R. 396-398 F). This is the agreement which petitioner breached, and upon which damages were awarded.

SUMMARY OF ARGUMENT.

Under the Rules of Civil Procedure for the District Courts of the United States, objections must be made prior to the retirement of the jury as to all matters assigned as error and the fact that no objection was made by counsel for petitioner before the retirement of the jury precludes him from assigning such errors.

When a contract has been obtained through fraud and misrepresentation, and, under instruction from guilty party, subsequent acts are done in affirmance of the contract, the party defrauded does not lose his right to sue for damages.

When a party to a contract upon discovery of fraud and misrepresentation cannot safely discontinue or recede, he is not bound to do so, and acts done in affirmance of the contract do not constitute a waiver of the right to recover damages.

Under a lease contract, a lessee may continue to occupy the premises and demand the damages suffered through the lessor's fraud, and the payment of rent does not raise the presumption of an intent to waive the fraud or the right to damages, and the damages are the difference in the rental value of the premises as they were and as they would have been if as represented.

Where a contract has been made to sell and deliver a certain nationally advertised product and a product of inferior grade and quality and manufactured under ifferent specifications is delivered instead, although falsely labeled and sold as the advertised product by the seller, the act constitutes a breach of the contract and the buyer

may recover damages for such breach to the extent of the actual damage suffered.

The Circuit Court of Appeals made no error in its opinion and the judgment is not in conflict with local law. Neither is it in conflict with any other case decided by any other Circuit Court or the same Court, but on the contrary, the decision conforms to local law and the decisions of the Supreme Court of Tennessee and to the decisions of the Circuit Court of Appeals for the Sixth Circuit in all prior cases.

ARGUMENT.

Both the District Court and the Circuit Court of Appeals considered carefully the claims of petitioner as well as the authorities cited by petitioner's counsel. Both Courts held that the authorities relied upon did not apply to this case (R. 332-509-510). The brief and petition to rehear (R. 513, 527) is practically identical to the petition for certiorari filed in this Court.

Counsel for petitioner also made the same argument to the jury that he makes in his brief, but the jury, being the exclusive judges of the evidence and facts, found the petitioner guilty as charged (R. 347, 361) and the Circuit Court of Appeals found no error (R. 509-510).

Petitioner introduced no witnesses and no proof to dispute any of the evidence or witnesses introduced by respondent.

Under Rule 51 of the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court pursuant to the Act of June 19, 1934, C. H., 651—

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Notwithstanding the written "Request for Charge" made by counsel for petitioner (R. 334, 349-352) petitioner's counsel when given the opportunity to do so by the Court (R. 348-349) made no objection to the failure of the Court to charge the jury as requested.

Counsel for petitioner did not make any objection or note any exception to the Court's action in over-ruling his motion for a directed verdict at the time it was over-ruled (R. 333). The Circuit Court held that the questions were not properly reserved for review (R. 509).

Under Rule 51 of the Rules of Civil Procedure, petitioner's petition should be dismissed and on that ground alone the certiorari should be denied.

The Law As to Waiver for Fraud and Misrepresentation.

In 27 Corpus Juris 25, 137, it is stated with authorities cited in notes thereunder, that:

> "Where plaintiff has fully executed his part of the contract, acts thereafter done by him in affirmance of the contract and with knowledge of the fraud do not ordinarily amount to a waiver."

Under Paragraph 138, 27 Corpus Juris 25, it is further stated:

> "The rule permitting acts in affirmance of an executed contract to be performed after discovery of fraud without waiving an action for deceit applies also, generally speaking, to a contract which is partly executed at the time of discovery of the fraud, particularly where further damage would be occasioned to the defrauded party by a rescission, or the past performance is such that the party cannot safely discontinue or recede, or further performance is necessary to determine positively whether fraud has been practised."

The Court below (R. 328-329) very aptly saw the position that respondent would have been placed in by trying

to cancel or rescind the lease contract as the petitioner insists should have been done. Judge Darr said:

> "If your people had been forced to repudiate the contract on the lease and somebody had to buy the supplies, they would have been placed in an unreasonable position—
>
> "But, if during that time, and for some other reason—there is no authority that I have in mind—is undertaking to adjust that, he is also tied up for the contract that is practically inseverable from the lease contract which he has fulfilled during the six month period. Then, that would put a different situation on him, whether or not he would have to repudiate it to his great injury. If he had to surrender his lease or still have had to keep buying the products, he would be in bad shape."

With reference to the case relied upon by petitioner, *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 615, 52 L. R. A. 745, Judge Darr in considering that decision said (R. 332):

> "I think this about it—I think if this lease contract had been just a lease contract and not tied in with the other, I do not believe the plaintiffs could bring suit, nothing else appearing, because I think that is the rule of law stated by Judge Lurton in this case, and is generally recognized to be the ruling law on fraud and deceit—But in this particular case, I think the case is somewhat different. I think the proof though indicates they took it up and tried to get it adjusted and that they had to have stations in order to carry out their distributor's contract to buy, and with the same people, and negotiations were on. I would say in this particular case, it would be an exception to that general rule and they would be permitted to recover if they show that they were actually damaged."

Counsel for petitioner does not discuss in his petition or brief the main issue involved in this case. The principle and general rule permitting acts of affirmance as

quoted from 27 Corpus Juris 25, *Supra*, citing *Harris* v. *Egger*, 226 Fed. 389, are well established. In the *Harris* v. *Egger* case, decided by the Circuit Court of Appeals for the Sixth Circuit through Judge Warrington in 1915, the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, was distinguished. The *Harris* v. *Egger* case was also a Tennessee case decided 15 years after the *Simon* v. *Goodyear Metallic Rubber Shoe Co.* case, *Supra*, was decided.

The case of *Jackson* v. *Parsley*, 173 Tenn. 650, 122 S. W. 2d 427, 429, is in point in principle with the facts in this case and the ruling of Judge Darr thereon. In that case, Parsley sued Jackson Bros. for damages for breach of warranty of a truck or, in effect, for fraud and misrepresentation. The buyer after discovering the defect, fraud or misrepresentation immediately notified the seller who told him to "go ahead and use it until the man got there from the factory." The Tennessee Supreme Court held:

> "Under the facts of this case, however, the seller is not in a position to raise this question since, with full knowledge of the defect and the danger attending its operation, it insisted on the purchaser using it until the defect could be remedied. Parsley needed the truck in his hauling business. Necessarily, he would have suffered loss had he refrained from using the truck pending the arrival of a mechanic from the factory, and for such loss the seller would have been liable. To avoid this liability the seller insisted that the purchaser continue to use the truck in its defective condition, trusting thereby that the damages might be less than would result from not using the truck until it could be repaired. Since the purchaser followed the instructions of the seller the latter is in no position to say that he should have disobeyed those instructions and pursued some other course."

The Tennessee Supreme Court in the *Jackson* v. *Parsley* case, *Supra*, quoted with approval *Hayssen Mfg. Co.* v. *Mootz*, 116 W. Va. 204, 179 S. E. 301, and *O. C. Barber*

Mining & F. Co. v. *Brown Hoisting Machine Co.*, 6 Cir., 258 Fed. 1, wherein Judge Warrington said:

> "We think that in each of those cases the conduct of the seller operated to charge it with affirmatively consenting to the buyer's use of the article as a fair method of ascertaining the damages suffered while efforts were being made to remedy the admitted defects."

In quoting from the *Hayssen Mfg. Co.* v. *Mootz* case, *Supra*, the Court of Tennessee said:

> "As grounds of reversing the judgment and setting aside the verdict, the plaintiff relies principally upon two legal propositions; First, that the breach, if any, arose immediately after the defendant began operating the machine and that he had no right to continue in his efforts to operate the same and thereby to pile up damages; second, that it was the duty of the defendant to minimize his loss and that it was reversible error to allow him to recover damages which he might have avoided by adherence to this rule.
>
> "The juridical basis of these propositions is sound, but, under the evidence, which we must view in the light most favorable to the defendant because of the verdict, we are of the opinion that the said legal principles are not controlling herein. This view is taken because the jury was warranted in believing from the evidence that the defendant's continuous efforts through a period of months to operate the machine were encouraged by the plaintiff."

In *Pryor* v. *Foster*, 130 N. Y. 171, it was held that the plaintiff had the right to continue to occupy the premises and demand the damages suffered through defendant's fraud, which were the difference in the rental value of the premises, as they were and as they would have been if as represented; the plaintiff's payment of the rent did not raise the presumption of an intent to waive the fraud or the right to such damages.

The Tennessee case of *Wells* v. *Holley*, 145 Tenn. 345, is not in point in any particular with this case. In that

case, the plaintiff knew before he accepted the deed and paid his money and executed his notes that there was a shortage of acreage. In this case, the Magrath Oil Company did not know of the fraud and misrepresentation until after they had put the money in, signed the lease and operated for some time. They had already suffered their loss, their money was already in the business (R. 42). The notes executed to petitioner were for gasoline and oil, not for rent (R. 8, 301).

After the fraud and misrepresentation was discovered, respondent immediately took the matter up with petitioner and was instructed to go ahead (R. 42); that "The thing to do was to put in new grease racks which the stations did not have, put in other pumps, which the stations did not have, and just get in there and go to work and pull it out" (R. 44). "Go ahead and push the thing and it would not take long to get the 80,000 gallons through the stations" (R. 42).

Finally, after respondent became convinced that it would not get the 80,000 gallons through the stations after being told to "go ahead and push the thing" and after doing so as instructed, he notified the petitioner he was quitting (R. 52).

> "As a matter of fact, I just flatly, I just told them I was quitting. So, finally, Mr. Kendall got in touch with Shreveport and Shreveport went ahead and reduced the rental to one cent per gallon."

Breach of Contract.

The jury from the evidence found the petitioner guilty of having breached its contract by failing to deliver "Koolmotor" gasoline and of delivering a gasoline of inferior quality.

The contract sued upon for breach was executed the 21st day of November, 1938 (R. 396, 398 F) (After the

monthly rental had been reduced on the contract of lease), and the contract provided that (R. 398 E and F):

> "The parties hereto mutually agree that, except as to claims and suits for the purchase price of goods, wares, and merchandise sold under the terms hereof, all claims, demands, and causes of action arising from the breach of this agreement, or from the manner of its performance, or by reason of its provisions and their performance, and asserted by one of the parties against the other, shall not be maintained in any court, unless suit shall be brought on such cause of action within six (6) months of the date of the act, or omissions, giving rise to such claims, demands, or cause of action."

For this reason, suit and recovery by reason of the failure of appellant to deliver "Koolmotor" gasoline was limited to the period from April 21, 1939, to October 21, 1939.

Section 7262 (1)(a)(b) of Williams' Tennessee Code Annotated provides:

> "(1) Where there is a breach of warranty by the seller, the buyer may, at his election:
>
> "(a) accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;
>
> "(b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty."

The contract between the parties was a continuous contract and certainly one breach on the part of petitioner in delivering the wrong kind of gasoline and the acceptance of that wrong kind did not bind respondent to accept the wrong kind all of the time. The same conditions with reference to this contract existed as in the case of the contract of lease. If respondent had refused to accept the gasoline and notified petitioner of its intention

to cancel on thirty days notice as insisted upon by counsel for petitioner, then it would have immediately put respondent out of business as all of the stations were advertising Koolmotor gasoline. The pumps had Koolmotor globes (Article VII of the Distributor's Sales Agreement) (R. 398 C), "and discs, frames, sidewalk signs and other advertising materials so as to properly identify buyer's stations for the sale of seller's products." The whole business was set up to sell only the products of petitioner. It could not buy gasoline from other manufacturers and sell them under petitioner's trade names and brands.

Section 7242 of Williams' Tennessee Code Annotated provides:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."

The contract expressly fixes the period of six months as the reasonable time within which notice or suit may be brought by reason of the breach of the contract or "from the manner of its performance or by reason of its provisions and their performance" (R. 398 E and 398 F).

At all times between April 21, 1939, and October 21, 1939, petitioner falsely billed respondent for the gasoline sold and delivered as "Koolmotor" or "KM Gaso" meaning "Koolmotor" (R. 404).

Petitioner represented the gasoline as Koolmotor gasoline:

> "As a matter of fact, both Mr. Bolton and Mr. Kendall represented it as Koolmotor gasoline shipped out of Nashville" (R. 72).
>
> "They endeavored to convince us it was Koolmotor until the definite proof was secured which enabled us to make them admit it was Pan-Am" (R. 301).

In *Cotton Oil Co.* v. *Gin and Lumber Co.*, 138 Tenn. 58, it was held:

> "Where there is an express warranty, the buyer is under no obligation to inspect or examine the goods purchased but may rely on the warranty. The main purpose of a warranty is often to excuse examination and render examination unnecessary and even if the buyer does make an examination of the goods, this does not necessarily do away with the effect of the warranty. A purchaser may examine the goods and exercise his own judgment and at the same time may protect himself by taking a warranty."

In *Marcum* v. *Potter*, 148 Tenn. 251, it was held:

> "The measure of damages for breach of warranty is the loss directly, and naturally resulting, in the usual course of events from the breach of warranty.
>
> "Ordinarily, of course, this loss is ascertained by applying the rule of the difference in price of the animal as warranted and the price as delivered. But this rule is not an invariable one. The purpose of the rule is to ascertain the true amount of the loss actually and directly sustained."

Counsel for petitioner seeks to question the findings of facts by the jury, but our position is that there was sufficient evidence to convince the 12-man jury that petitioner was guilty as charged.

Conclusion.

Respondent insists that no error has been committed by the Circuit Court of Appeals for the Sixth Circuit in failing to apply Tennessee law, and that the decision is not in conflict with Tennessee decisions or other decisions of other Courts or other decisions on the same matter by the Sixth Circuit.

Wherefore, respondent prays that petitioner's petition for certiorari be denied.

Respectfully submitted,

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